United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-7123

ORIGINAL

To be argued by:
LESTER E. FETELL

United States Court of Appeals

FOR THE SECOND CIRCUIT

B
P/S

GIUSEPPE CAPATORTO,

Plaintiff-Appellant,

against

COMPANIA SUD AMERICANA DE VAPORES, CHILEAN LINE, INC.,

Defendant-Appellee.

On Appeal from the United States District Court for the Eastern District of New York

BRIEF FOR PLAINTIFF-APPELLANT

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BRIEF FOR PLAINTIFF-APPELLANT

Statement

Plaintiff-appellant commenced an action in the United States District Court for the Eastern District of New York to recover damages from the defendants-appellees by reason of personal injuries which he sustained in the course of his employment as a longshoreman in the employ of Pittston Stevedoring Corp. (stevedore). The accident occurred on board the S/S IMPERIAL, a vessel owned and operated by the defendant-appellee (shipowner). (75 Civil 1601).

Shipowner's Answer (A8) set forth, inter alia, a defense of release. Shipowner joined the stevedore as a Third Party defendant.

Plaintiff commenced a separate action (75 C 750) in the same court seeking a declaratory judgment pursuant to 28 U.S.C. 2201 to set aside the alleged general release pleaded by the shipowner.

A non-jury trial of the issues in the declaratory judgment action was held before Hon. John R. Bartels, USDJ. The trial court, in an oral decision dictated from the bench on March 2, 1976, dismissed the complaint (A108) upon a finding that the release is "in all respects valid" (A113). From that dismissal plaintiff appeals.

Facts

Plaintiff-appellant Giuseppe Capatorto,[1] an American citizen who does not read or write English, and with a limited command of the spoken word in English (A20), retained the services of the law firm of Zimmerman and Zimmerman, Esqs. (A108), in connection with his claim for personal injuries against operators of the S/S IMPERIAL. The case was assigned to Martin Lasoff, Esq. in the Zimmerman firm.

An action was commenced in the United States District Court for the Southern District of New York on or about September 30, 1974 (A60), following the commencement of a prior action for the same relief in the Supreme Court of the State of New York, County of New York on or about February 9, 1973. Both actions were handled by Mr. Lasoff.

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[1] The testimony of plaintiff Cpaatorto, attorney Lasoff and Claims Agent Billyer are reproduced in toto in the appendix.

Mr. Lasoff testified that he "entered into a settlement negotiation" with one Wayne Billyer, a claims representative acting on behalf of the shipowner (A60). Mr. Billyer mailed to Mr. Lasoff releases in the gross sum of $16,182.57 (or the sum of $12,500.00 over and above a compensation lien of $3,682.57) *which Mr. Lasoff and Mr. Billyer had agreed upon* (A64, 95). Apparently Mr. Capatorto had not been consulted by any one, and Mr. Lasoff "agreed upon" the settlement (A63) without prior client consultation.

Upon receipt of the releases from Mr. Billyer, Mr. Lasoff wrote to Mr. Capatorto, inviting him to "come into the office . . . with reference to the possible settlement of your case" (Def. exhib. in Evid. A) (A115). The letter was dated December 18, 1974. Plaintiff appeared at Mr. Lasoff's office on December 24, 1974, the day before Christmas (A88); as a matter of fact, during the office Christmas party, while counsel and his staff were consuming sandwiches and "bottles of champagne" (A86).

Mr. Lasoff spent, at a maximum, five minutes with Mr. Capatorto in explaining (if in fact he did explain) (A68) the settlement, and in having the client sign the releases (A67, 87).

Mr. Lasoff testified that when plaintiff appeared at his office on December 24, Mr. Capatorto complained that "my back still hurts me". The said complaint to the contrary notwithstanding, Mr. Lasoff "recommended that (plaintiff) accept the settlement" (A89).

Mr. Lasoff's recommendation to his client was predicated upon an eighteen month old medical report (A90, 91). The attorney testified as follows in this connection (A90):

> "Q. I believe you said earlier that it was your feeling that inasmuch as he had not seen the doctor

in 18 months that he had better accept the offer.

A. No. My feeling and my explanation was nobody is ever happy with a settlement, either way, no matter what the amount is. I explained to him if we were going to court to try this case and I would bring him in there to testify, he still has pain in his back and he has not seen a doctor for his back since I believe March of 1972, that it would not be believed by a jury and that therefore I would recommend that he settle the case. (A91)

* * *

Q. Had you made inquiry and he told you that he was indeed having further back pain, would you not have considered it professional to suggest to him that he see another doctor?

A. If *I felt* that he needed another doctor *I* would have sent him to another doctor." (italics added).

Apparently Mr. Capatorto was persuaded by his attorney to sign the release. This decision was made during the five minute period allotted to the client during the Christmas party. Thereafter, Mr. Lasoff conceded that plaintiff, prior to receiving any money, attempted, on "half a dozen occasions", to repudiate the settlement (A67, 68, 70).

"Q. I believe I asked you, did he subsequently come to you and say that he did not want to go through with this settlement?

A. Mr. Capotorto called me on half a dozen occasions and I also believe came to see me several times and what he wanted me to do was call Pittston and reinstate his compensation payments because he was having trouble with his back. *I explained I couldn't do that, that he had signed a release.* He insisted I could but he did call me and did come to see me." (Italics added).

Apparently, Mr. Lasoff settled not only the third party action against the shipowner, but also delimited his compensation rights, pursuant to the compensation treaties. In this regard the record is somewhat confused and appellant respectfully directs the Court's attention to Mr. Lasoff's testimony in regard to Mr. Capatorto's *in futuro* rights vis-a-vis compensation payments (A69).

With respect to the question of whether Mr. Capatorto in fact understood what he was signing, and the full legal and factual ramifications thereof, the following testimony of Mr. Lasoff is pertinent (A70):

> "The Court: And he says he does not understand much English. Did you get the impression that he understood you when you so stated?
>
> The Witness: I really could not say now. My recollection of the conversation is not that specific *as for me to say whether he understood me or not. Mr. Capotorto, I felt understood that money . . .*"

In any event, *Mr. Capatorto never received any money from the alleged settlement.* Mr. Lasoff testified that he mailed the releases to shipowner's claims representatives on December 24, 1974 (A97) and that "eventually" Mr. Lasoff received a check (Exhib. 3 in evid.) (A117) dated January 22, 1975. He conceded that what purports to be Giuseppe Capatorto's endorsement on the back of the check is in actuality *a forgery* (A101), and what purports to be Zimmerman and Zimmerman's endorsement on the back of Exhibit 3 is in fact a forgery. Mr. Lasoff had no explanation for these forgeries.

Mr. Lasoff testified, without further elucidation, that notwithstanding the forged indorsements, his firm, out of its own funds, returned the sum of $12,500.00 to the shipowner's underwriters (A102).

Concededly, Mr. Capatorto was never paid, and the settlement funds were returned to the underwriter's representative (A102).

POINT I

Longshoremens' releases, given to shipowners, are to be treated similarly as releases given by seamen.

It is now Hornbook Law that the burden of proving a maritime release is a part of the general Law of Admiralty applicable to seamen and longshoremen alike, and on this issue, the burden of proof is on the shipowner.

Wooten v. *Skibs A/S Samuel Bakke,* 431 F 2d 821;
Panama Agencies Co. v. *Franco,* 111 F 2d 263;
W. J. McCahn Sugar Refining and Molasses Co. v. *Stoffel,* 41 F 2d 651, 654;
The Law of Personal Maritime Injuries 3rd— Martin J. Norris at page 13;
1 *Edelman Maritime Injury and Death,* 442.

POINT II

Criteria for setting aside a maritime release.

The catalogue of criteria applied to testing maritime releases, their validity or invalidity, are numerous and cover a multitude of factual situations, many of which are not applicable to the facts at bar. Appellant will limit his discussion to such criteria as are pertinent to the issues here.

The classic situation of overreaching in cases of maritime release generally involves a situation where the mari-

time worker is face to face with a claims agent representing the ship. It would thus appear that where the maritime worker is represented by counsel, the claims representative is not in a position to mislead or overreach directly. Concededly, the trier of the facts should, and undoubtedly will, take into account the fact that the maritime worker was represented by counsel. *This does not mean to say, however, that where there is counsel, ipso facto, the release is valid.* Further judicial inquiry should be made to ascertain whether that advice was disinterested, or reasonably given. Norris, The Law of Seamen, 3rd Edition, Volume 1, Sects. 505 and 512.

As Norris points out, where a maritime worker signs a release, acting upon the advice of an attorney "with the benefit and advantage of legal guidance and *after investigation into the extent of his injury,* the release, absent fraud, will not be set aside." (Italics added). At bar, the record clearly reflects that *counsel did not make an investigation into the extent of injury.* In *Stichon* v. *American Export Lines, Inc.,* 115 F 2d 830, a bargeworker settled a suit for $2,500 with the aid of a court appointed attorney. It was not until two years later that he attempted to set aside the release. Plaintiff there attempted to set aside the release predicated upon events which arose within two years after giving the release.

At bar, the issue resolves itself to the *conditions which existed at the very moment Capatorto put his pen to paper to sign the release.* At the very moment of the execution of the document, Capatorto was still complaining of injury, and he continued to do so persistently immediately thereafter.

The pertinent cases make reference to the intelligence, literacy, amount of schooling and ability to understand the nature and character of his accident releasing his claims (Norris, Section 514 and cases cited thereunder).

It is clear, and beyond cavil, that Capatorto, during a brief five minute session with his attorney, in the midst of a Christmas party, was not given a fair explanation, if any explanation was given at all, which would enable him to understand the nature and the character of his act. His attorney testified that even he did not know whether Capotorto understood what was being told to him. It was the attorney's impression that "Capotorto, I felt, understood the money" (A70). Understanding money is not one of the criteria for upholding a release, particularly where there are continuing complaints of disability. It is clear that Mr. Capatorto, on his own, without the benefit of counsel, did not have the intelligence, literacy, or sufficient schooling to understand the nature and character and ramifications of his acts.

As one reads the many cases upholding maritime releases, there consistently appears language which indicates that in any given case, the particular maritime worker had a full understanding and appreciation of his actions in releasing his rights. Here there is no such demonstration. Note for example, *Maher* v. *United States,* (1972 D.C. Cal, 1974 AMC 1585) where the Court found that the plaintiff, a chief engineer, was a man of unusual intelligence, who had the benefit of diagnosis and treatment by his own private physician and by the Public Health Service doctor. Capatorto was relegated to treatment by physicians chosen by his employer, a litigant in this lawsuit, in addition to doctors to whom his attorney, in his own wisdom, sent him.

Plaintiff was relegated to the medical wisdom of his own attorney, who testified that if he (the attorney) felt that plaintiff needed another doctor, he (the attorney) would have sent him (A91). Can it be said that Mr. Capatorto was given the benefit of the wisdom of impartial medical advice?

The trial court adverted to and predicated its dismissal herein on a limited number of criteria: unilateral mistake, fraud and misrepresentation. In the classic case of *Garrett* v. *Moore McCormack Co., Inc.,* 317 US 239 (1942), the Supreme Court held:

> ". . . the burden is upon one who sets up a seamen's release to show that it was executed freely, without deception or coercion, and that it was made by the seaman with full understanding of his rights."

The Court below, in its opinion, made no finding that Capatorto signed the release "with full understanding of his rights". If such a finding is implicit in the decision below, then, it is respectfully urged, such a finding is clear error on this record.

A more recent case in the Fifth Circuit, while not completely on all fours in many respects, is nevertheless an important exegesis of the legal issues involved in releases. *Robertson* v. *Douglas Steamship Company,* 510 F 2d 829, 834 (5th Circuit, 1975). This case reiterates the rule that longshoreman's releases are governed by the law of seamens' releases as defined in *Garrett* v. *Moore McCormack Company,* supra. The case also reiterates the long recognized proposition that "a mistake with regard to diagnosis has long been recognized as cause for setting aside a seaman's release", *Robertson* supra at 835. Superficially, if not simplistically, one can almost hear appellee urging that a herniated disc and a lumbosacral sprain are not the disparate diagnoses referred to in *Robertson.* One need not be a physician, however, to fully appreciate that a lumbosacral sprain involves the muscleature of the back, whereas a herniated disc involves the internal architecture of the spinal column with its attendant pressure on the nerves of the spinal cord. While the two injuries may be

geographically or anatomically contiguous, they involve different anatomic structures with completely different results. Any court, dealing as courts do with personal injury claims, may take judicial notice of the distinction between a lumbosacral sprain and a herniated disc.

Judge Wisdom, writing in *Robertson,* held:

> "A longshoreman who signs a release may have to take his chances that a properly diagnosed condition was the subject of an overly optimistic prognosis and that his injuries may be more serious and extensive than originally thought. However, the law does not require him to take his chances when the diagnosis is itself erroneous and he is suffering from a disease entirely different in nature from that diagnosed." (At page 836).

The testimony of Mr. Lasoff reveals that both he, as attorney for Mr. Capatorto, and Mr. Billyer, representing shipowner's insurance interests, arrived at a settlement figure predicated upon a diagnosis made some 18 months before the settlement discussions. That diagnosis was lumbosacral sprain. Neither of these worthy gentlemen had any knowledge as to the etiology of the complaints made by plaintiff to his attorney in December of 1974. The question and answer previously cited in this brief bears repetition at this juncture:

> "Q. Had you made inquiry and he told you that he was indeed having further back pain, would you not have considered it the best thing to suggest to him that he see another doctor.
>
> "A. If *I* felt that he needed another doctor, *I* would have sent him to another doctor."

This is a thin reed indeed upon which to arrive at a conclusion that when Mr. Capatorto signed the release he

was in fact armed with "full understanding of his rights" as mandated by the Supreme Court in the *Garrett* case.

> "Robertson signed the release with the understanding that the nature of his injury consisted of superficial injuries to his neck, back and limbs. The injury that was later discovered demonstrated the mistake that went not nearly to the extent and outcome of his injury, but indicated that he was the victim of an injury entirely different in nature from that diagnosed. This difference supports a finding of mutual mistake of a material factor." *Robertson,* supra, at 836.

One does not quarrel with the proposition that a maritime worker who settles a case involving a lumbosacral sprain is given no guarantee that that self same lumbosacral spain will not cause future disability for an indeterminate period of time. This is a risk inherent in all settlements, and which is the basis of all settlements. Where, however, as appears at Bar, the maritime worker believes, because his attorney tells him, that he is suffering simply from a lumbosacral sprain, when in fact he is suffering from a herniated disc, as is pointed out in *Robertson,* the issue is not one of "extent and outcome" but rather that of a different injury which has a completely different effect on the anatomy. It is this distinction which the Honorable District Court failed to take into account. The Court below speaks of unilateral mistake. This is clear error. If there were a mistake of a material fact, that mistake was mutual both in terms of the shipowner's representative, who believed he was settling a lumbosacral sprain case and Capatorto's attorney, who determined in his own wisdom that that was the full extent of this man's injury. The Fifth Circuit in *Robertson* (at page 836) makes reference to the trial court's instructions to the jury which makes reference to Mr.

Robertson's condition at the time. Unfortunately, in the case at Bar there was no clear knowledge of his condition at the time he gave the release. Certain assumptions were made by the shipowner, and Mr. Lasoff, that the diagnosis made 18 months previously was a correct diagnosis. There was an initial mistake of fact at Bar and this should have been recognized by the Court below.

POINT III

The Court below erroneously relied upon New York State Law rather than Maritime Law.[2]

In the words of the Supreme Court, *Kermerac* v. *Compagnie Generale Transatlantique,* 358 U.S. 625 (1958):

> ". . . The legal rights and liabilities arising from (injury aboard a vessel) were therefore within the full reach of the admiralty jurisdiction and measurable by the standards of maritime law." (parenthetical phrase added).

(See also: *Garrett* v. *Moore McCormack Co.,* 317 U.S. 239).

In its oral opinion (A108) the Court made no reference whatsoever to Maritime Law, relying solely upon Warren's Negligence, Fruiner Personal Injury and Williston on Contracts (A112).

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[2] Plaintiff submitted a memorandum of law citing maritime cases; defendant did not submit any brief of memorandum, and cited one case only (A) Clinton 254 F.2d 409 (inaccurately cited in the the record as 2409). That case is totally inapposite since it involved a seaman who waited eight years from the time he signed the release until the time he commenced the action in which the release was raised as a defense. Of the multitude of maritime cases available on this subject, this was the only case relied upon by defendant at bar.

A reading of Section 2.03 (1965 Edition) of Warren's New York Negligence makes no reference whatsoever to releases or unilateral mistakes. This section deals only with contributory negligence as a defense (A114).

In any event, by reason of the *sui generis* nature of Maritime Law, maritime releases are governed by their own special rules, to which reference has been made in Point I, supra. The graveman of the Trial Court's analysis may be found in the following (A112):

> "If there was any mistake on the part of the plaintiff, defendant could not be charged with the mistake at the time the release was signed and consequently the mistake was unilateral and not mutual.
>
> "Such a unilateral mistake is no ground for a recission. *See,* 1 Warren's Negligence, Section 2.03 (1965); 3 L. Frumer, Personal Injury §4.01(2)(a) at 397 (1957); 13 Williston on Contracts §1551 (3d Edition 1970)."

The legal test applied by the Court, as quoted above, is simply not the appropriate test to be applied vis-a-vis maritime releases.

The Court, immediately following the foregoing quoted portion of the opinion, suggests that plaintiff's sole remedy is a malpractice suit against attorney Lasoff (A113). That is simply not the case. Plaintiff also had a viable remedy of setting aside the release, which remedy he attempted to enforce in this proceeding.

It is noteworthy that the Trial Court's opinion is totally devoid of a solitary reference to the law governing maritime releases. Having erroneously applied state law, and

having failed to apply appropriate federal maritime law, the Trial Court committed clear error and the judgment below should be reversed.

Respectfully submitted,

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of Counsel

Services of three (3) copies of
the within brief is
hereby admitted this 23 day
of June , 1976

Attorney for